Supreme Court, U.S.
FILED
FEB 4 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1979

No. 79-1056

NORTHWEST AIRLINES, INC.,

Petitioner,

—against—

TRANSPORT WORKERS UNION OF AMERICA, AFL-CIO

—and—

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,

Respondents.

BRIEF OF AIR LINE PILOTS ASSOCIATION, INTERNATIONAL IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Printinghouse Press – Bar Ass'n. Steno Serv. (Appeals Section) 212-840-1891

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1979
No. 79-1056

NORTHWEST AIRLINES, INC.,

Petitioner,

v.

TRANSPORT WORKERS UNION OF AMERICA, AFL-CIO,

AND

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,

Respondents.

BRIEF OF AIR LINE PILOTS ASSOCIATION, INTERNATIONAL IN OPPOSITION TO PETITION FOR CERTIORARI

QUESTIONS PRESENTED

1. Whether the Court below correctly concluded, consistent with all other decisions on the issue, that an employer held liable under the Equal Pay Act may not seek contribution from a union for that Equal Pay Act liability.

2. (a) In the absence of any provision in Title VII of the Civil Rights Act of 1964 allowing for contribution, may an employer previously held liable under the Act maintain an independent action against a union for reimbursement for any portion of that Title VII liability where the union has never been named in a charge of discrimination filed with the Equal Employment Opportunity Commission or adjudicated liable under Title VII upon suit by an "aggrieved person"?

(a) If so, is petitioner barred from maintaining such an action because of its excessive, prejudicial delay in asserting any claims against the unions?

STATEMENT OF THE CASE

This case represents an attempt by Northwest Airlines, Inc. ("Northwest" or "Petitioner") to obtain contribution from the Air Line Pilots Association, International ("ALPA") and the Transport Workers Union of America ("TWU"), former collective bargaining representatives for flight attendants employed by Northwest, for Northwest's

financial liability in Laffey v. Northwest Airlines, Inc., 366 F. Supp. 763 (D.D.C. 1973) and 374 F. Supp. 1382 (D.D.C. 1974), aff'd in part and vacated in part, 567 F.2d 429 (D.C. Cir. 1976), cert. denied, 434 U.S. 1086 (1978), under two comprehensive, regulatory statutes - The Equal Pay Act of 1963 ("EPA")* and Title VII of the Civil Rights Act of 1964 ("Title VII)** - which do not provide a right to contribution.

A. The Absence of Any Timely Claims Against the Unions in Laffey v. Northwest Airlines

In Laffey, Northwest was held to have engaged in widespread violations of the Equal Pay Act and Title VII against its female flight attendants. Contrary to the implicit suggestion in Petitioner's Statement of the Case, no union conduct of any kind was held in Laffey to violate any

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* 29 U.S.C. §206(d)(1).

**42 U.S.C. §2000e-2(a).

law.* The sole liability was Northwest's. Indeed, there was not even the suggestion of any alleged union misconduct - even after ALPA had been joined in the case ** - until "almost four years after the action was commenced, more than three years

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* Northwest's extensive discussion in its "Statement" of alleged union conduct in negotiations is entirely self-serving and inaccurate, and is totally unsupported by the record in this case, which consists solely of the complaint and answers, and the decisions issued by the lower courts. Any response would similarly have to extend beyond the record, and is thus inappropriate at this time.

** Plaintiffs in Laffey "moved to join ALPA as a party 'solely for the limited purpose of assuring that the court will have before it all the parties necessary to effectuate relief'", Laffey v. Northwest, supra, 567 F.2d at 477-78, and did not seek any monetary relief from ALPA "[s]ince they deemed ALPA 'not responsible for any of the discrimination' alleged". Id. at 478. "By letter to the District Court, NWA advised that it had no objection to the employees' motion," id. at 478, and Northwest did not assert any claims against ALPA.

after NWA had answered the complaint, and ---several months after the court rendered its findings and judgment," 567 F.2d at 477, when Northwest belatedly attempted to amend its answer to assert a cross-claim for contribution or indemnity against ALPA. 567 F.2d at 476. As Northwest counsel conceded in argument before the Court of Appeals in the case at bar, this extensive delay was the result of Northwest's purposeful litigation strategy. (Transcript of Argument, pp. 19-21). It is against this factual background - and not because of "procedural reasons"* - that the District Court rejected Northwest's untimely effort to obtain contribution in Laffey. The Court of Appeals affirmed that ruling as within the sound discretion of the trial court, emphasizing Northwest's extreme tardiness and the obvious "hardship on the parties" which would have followed from allowing Northwest to pursue its tardy claims. 567 F.2d at 477-78.

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* Petition for Certiorari ("Petition"), p. 6.

B. Northwest's Belated Attempt to Assert Claims Against the Unions in a Separate Action

Northwest attempted to cure its long delay in Laffey by filing a separate action for contribution for its liability under the Equal Pay Act and Title VII in Laffey. The District Court granted ALPA's motion to dismiss Northwest's claim for Equal Pay Act contribution, citing what it correctly described as the uniform judicial decisions rejecting any right to contribution, whether express or implied, with respect to Equal Pay liability. (App. B, pp. 4b-7b).*

The Court based its denial of ALPA's motion to dismiss the claim for Title VII contribution solely on the conclusion that the federal common law provides a right to contribution applicable to Title VII liability, "at least under some circumstances." (App. B, p. 18b). The Court

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* The decisions of the Courts below appear in the Appendix to the Petition, and are cited as "App. ___".

later amended its order to include a certification for interlocutory appeal under 28 U.S.C. §1292(b)*, and the Court of Appeals agreed to consider the appeal.

C. The Decision of the Court of Appeals

1. Equal Pay Act Contribution

The Court of Appeals affirmed the dismissal of Northwest's claim for Equal Pay Act contribution, "because we find such a right inconsistent with both the statute's language and purpose." 606 F.2d at 1353. (App. D, p. 6d). The Court rejected Northwest's claim that a right to contribution should be "implied", after applying the guiding tests found in Cort v. Ash, 422 U.S. 66, 78 (1975). The Court emphasized that its "conclusion is also in accord with a persuasive and well-reasoned line of precedent." 606 F.2d at 1355. (App. D,

* In addition to certifying its Title VII contribution ruling for interlocutory appeal, the Court agreed that it had erred in suggesting that there was diversity jurisdiction over the case, and accordingly amended its decision to eliminate footnote 18 and to renumber all subsequent footnotes. This Order appears at Appendix 1 hereto.

p. 11d). No decisions recognizing a right to Equal Pay Act contribution were cited by the Court or Northwest; none exist.

2. Title VII Contribution

The Court of Appeals found it premature - and perhaps ultimately unnecessary - to consider the claim for Title VII contribution because Northwest's extensive delay in seeking relief might have constituted laches so as to bar its claim. The Court remanded the matter to the District Court to consider the laches issue.* There is no lower Court ruling on the laches issue which Northwest has petitioned the Court to review. In addition, the Court of Appeals has indicated that it will rule in the future, if necessary, on the merits of the Title VII contribution claim if the District Court does not find the action barred by laches:

* Northwest apparently would have this Court determine the factual issue of whether its conduct constituted laches. (Petition, p. 24).

> "If the trial court finds that laches is not a bar, the defendants' appeal may be renewed." 606 F.2d at 1356. (App. D, p.13d).

Nevertheless, Northwest now asks this Court to decide the issue in advance of any ruling by the Court of Appeals on the merits of the questions presented for review.

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

I. THE DECISION OF THE COURT OF APPEALS REJECTING NORTHWEST'S CLAIM FOR CONTRIBUTION UNDER THE EQUAL PAY ACT REFLECTS THE UNANIMOUS RULING OF ALL COURTS TO CONSIDER THE ISSUE, IS CLEARLY CORRECT AND DOES NOT MERIT FURTHER REVIEW

A. The Decision of the Court of Appeals Is Not In Conflict With Any Other Court Decisions

Contrary to Northest's protestations, every court that has considered a claim for Equal Pay Act ("EPA") contribution has agreed with the Court below that employers may not seek contribution or indemnity from labor unions for liability

arising under the Equal Pay Act. Denicola v. G.C. Murphy Co., 562 F.2d 889 (3d Cir. 1977); Usery v. Beloit College, 12 Empl. Prac. Dec. ¶11,203 (W.D. Wisc. 1976); Brennan v. Emerald Renovators, Inc., 410 F. Supp. 1057 (S.D.N.Y. 1975); Marshall v. Tombs Janitorial Service, Inc., 82 Lab. Cas. ¶33,559 (W.D. Mo. 1977).

The decisions cited by Northwest as indicative of a "conflict" are wholly inapposite. Indeed, none of the decisions even address the contribution issue.

Hodgson v. Sagner, Inc., 326 F. Supp. 371 (D. Md. 1971), aff'd sub nom., Hodgson v. Baltimore Regional Jt. Board, 462 F.2d 180 (4th Cir. 1972), did not award any damages to an employer against a union. The decision permitted the Secretary of Labor to recover a monetary penalty from a union in unique circumstances based solely on the outrageous conduct of the union therein where, after the employer had agreed to make whole female employees who had been discriminated against in violation of the EPA, the union insisted on diverting part of that "make whole" pay to other employees who had not been the subject of

discrimination. The Court of Appeals herein concluded that Sagner is "fully distinguishable from the present case and our ruling here is not the least bit inconsistent with that decision." 606 F.2d at 1356 (App. D, p. 11d). No other court has interpreted Sagner as providing employers with a right to contribution against a union. Denicola v. G.C. Murphy, supra, 562 F.2d at 894; Brennan v. Emerald Renovators, supra, 410 F. Supp. at 1062. See also, Tuma v. American Can Co., 367 F. Supp. 1178, 1182 (D.N.J. 1973).*

* The Department of Labor, in spite of its recovery in Sagner, has consistently taken a position against recognition of a right of employer contribution. Copies of Department of Labor briefs in other litigation were presented by ALPA to the Court of Appeals herein. See also Marshall v. Eastern Airlines, 474 F. Supp. 364, 366-67 (S.D. Fla. 1979), wherein the Court noted the Labor Department's opposition to employer contribution under the Age Discrimination in Employment Act, which, like the EPA, is enforced through provisions of the Fair Labor Standards Act. Furthermore, contrary to Northwest's contention (Petition, pp. 10, 13), the Courts have construed Department of Labor regulations as directing that enforcement of the EPA by private parties is only available through suit by employees against their employers under Section 216(b) of the Act. 29 C.F.R. §800.166(b); 29 C.F.R. §800.166(d). Brennan v. Emerald Renovators, supra, 410 F. Supp. at 1060 n.6; Tuma v. American Can Co., supra, 367 F. Supp. at 1181-82.

Nor is any conflict with the ruling below presented by Sinyard v. Foote and Davies Division of McCall Corp., 577 F.2d 943 (5th Cir. 1978) (Petition, p. 15). That decision only speaks to the substantive responsibilities imposed on unions by the EPA and Title VII, and does not consider any issue as to specific monetary remedies available against unions under the EPA - let alone the contribution issue.* Significantly, the Fifth Circuit has consistently refused to recognize a right to contribution for federal statutory liability under statutes which, like the EPA, do not expressly provide for contribution.**

* The same is true of Laffey v. Northwest Airlines, supra. Petitioner misleadingly paraphrases Laffey as recognizing a private claimant's right to assert a claim against a union for liability under the EPA. (Petition, pp. 7-8). Clearly, the Court below did not so construe its prior ruling in Laffey.

**See, e.g. Wilson P. Abraham Construction Corp. v. Texas Industries, Inc., 604 F.2d 897 (5th Cir. 1979) [no contribution for liability arising under the Sherman Act]; McCain v. Clearview Dodge Sales, Inc., 574 F.2d 848 (5th Cir. 1978) [no contribution for liability arising under the Consumer Credit Protection Act]; Marshall v. Eastern Airlines, Inc., 474 F. Supp. 364, 366-67 (S.D. Fla. 1979) [no contribution for liability arising under the Age Discrimination in Employment Act].

B. The Court Below Correctly Applied this Court's "Implied Rights" Tests in Rejecting Northwest's Claim

The EPA itself does not provide for contribution. While the Act subjects all violators - employers and unions alike - to possible criminal penalties and to suits for injunctive relief by the Secretary of Labor, 29 U.S.C. §§216(a) and (c), 217, only employers are subject to any kind of private right of action for damages. 29 U.S.C. §216(b).* Nevertheless, Northwest contends that a right of contribution should be "implied" in its favor, and that the Courts below erred in failing to apply the proper judicial standards. The contention is meritless.

* Section 216(b) provides that private actions to recover damages under the EPA may only be brought "against any employer (including a public agency)...by one or more employees..."

Congress added the phrase "against any employer (including a public agency)" to Section 216(b) in 1974 - eleven years after enacting to EPA - thus confirming that it has never intended to make the Act's private remedies applicable to unions.

The governing standards to determine whether a right should be implied are found in Cort v. Ash, 422 U.S. 66, 78 (1975). The Court of Appeals carefully analyzed Northwest's EPA contribution claim and concluded that it did not satisfy the Cort requirements because implication of a right of EPA contribution would be inconsistent with the comprehensive statutory scheme delineating specific remedies,* and with the EPA's stated purpose that "wage differentials based on sex...[constitute] an unfair method of competition." Equal Pay Act of 1963, Pub.L.No. 88-38, §2(a)(5), 77 Stat. 56; see 29 U.S.C. §202(a)(3)(1976). Other courts have similarly emphasized that this statutory purpose would be impeded by permitting a discriminatory employer to offset its own EPA liability through contribution, since that would restore part of its unfair competitive advantage and injure the competitive positions of employers who

* "Where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it." Transamerica Mortgage Advisors, Inc. v. Lewis, 100 S. Ct. 242, 247 (1979).

are in compliance with the statute. Usery v. Beloit College, supra, 12 Empl. Prac. Dec. ¶11,203 at pp. 5535-36; Brennan v. Emerald Renovators, supra, 410 F. Supp. at 1061. The Court of Appeals' focus on the explicit statutory purpose repudiates Northwest's assertion that the Court failed to consider Congressional intent. (Petition, pp. 16-18). As the Third Circuit concluded: "The Act evidences absolutely no Congressional intent to make a union liable either to an employee or to an employer." Denicola v. G.C. Murphy Co., supra, 562 F.2d at 894. Accord, Decision of District Court herein. (App. B, p. 7b).*

* Contrary to Northwest's contention, the legislative history does not support recognition of a right of contribution. The bill eventually passed by Congress in 1963 differed from previous proposals by incorporating the equal pay provisions into the enforcement structure of the Fair Labor Standards Act ("FLSA"). Congress was fully aware that the FLSA, as then written, subjected employers but not unions to private actions for back pay. The debates on enforcement of the EPA contain specific references to private employee suits against employers, but no such references to suits by private parties against unions. See, e.g., 109 Cong. Rec. 9196 (1963) [remarks of Rep. Frelinghuysen]; id. at 9208-09 [remarks of Rep. Goodell]; id. at 9215 [remarks of Rep. May].

C. The Equal Pay Act Contribution Issue Does Not Merit Further Review

Northwest seeks to attribute broad significance to its claim for EPA contribution by asserting that the decision below somehow undermines the statutory protections afforded to employees and impairs the enforceability of the Act. (Petition, pp. 12-15). The contention is facially spurious.

This case does not present the issue of what remedies an employee may have against a union under the EPA. The only EPA issue is whether a discriminatory employer found to have violated the Act can share its liability with a union through contribution. Resolution of that question has no bearing on enforcement of the statute.

Employees are fully protected by the present statutory scheme. As demonstrated by the Laffey case, injured employees for whose "especial" benefit the EPA was enacted, can secure full back pay remedies through suits against employers without the necessity of permitting discriminatory employers - whose conduct is regulated, not protected, by the statute - to offset this liability through contribution. Piper v. Chris-Craft Industries, 430 U.S. 1, 37 (1977). At the

same time, existing law creates a panoply of sanctions against unions - including criminal penalties, injunctive suits by the Secretary of Labor under the EPA, and back pay suits against charged union parties under Title VII - so as to deter unions from fostering discriminatory pay practices.* Clearly, recognition of a right of contribution is not "necessary to effectuate Congress' goals." Piper v. Chris-Craft, supra, 430 U.S. at 26.

II. IT IS ENTIRELY PREMATURE TO REVIEW THE TITLE VII CONTRIBUTION AND LACHES ISSUES SINCE NEITHER ISSUE HAS YET BEEN DECIDED BY THE LOWER COURTS

Petitioner asks this Court to review two questions with respect to its Title VII contribution claim: whether such a claim is viable as a matter of law and, if so, whether laches may bar the claim. The

* Moreover, this Court has only recently held that the "real hardship" which large damage awards may impose on easily depleted union treasuries militates against judicial recognition of implied remedies against unions. International Brotherhood of Electrical Workers v. Foust, 99 S. Ct. 2121, 2126-27 (1979).

Court of Appeals has not ruled on either issue; thus, neither is ripe for review.

The Court of Appeals declined to consider the merits of the Title VII contribution claim. Instead, because of the distinct possibility that Northwest's extensive delay in asserting its claim might require dismissal of the action, the Court remanded the laches question for an initial determination by the District Court. Not only is there no ruling for review,* but the Court of Appeals specifically stated that it would rule on the merits of the Title VII claim if a ruling became necessary: "If the trial court finds that laches is not a bar, the defendants' appeal may be renewed." 606 F.2d at 1356. (App. D, p. 13d).

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* Indeed, as to the laches question, petitioner offers no ruling to which it objects, but rather seeks review by this Court of the position taken by the EEOC as amicus curiae below in apparent anticipation of the possibility that the District Court might adopt that position on remand. (Petition, pp. 23-25).

The absence of rulings by the Appellate Court, and the Court's remand for factual development of issues related to the questions presented for review, require denial of the Petition as premature. See Brotherhood of Locomotive Firemen and Enginemen v. Bangor & Aroostook R.R. Co., 389 U.S. 327, 328 (1967) ("because the Court of Appeals remanded the case, it is not yet ripe for review by the Court.")* Cf. Wise v. Lipscomb, 437 U.S. 535, 549 (1978) (Powell, J. conc.) ("there is no reason for this Court to explore difficult questions concerning §5 of the Voting Rights Act in the absence of consideration by the courts below.") Whether or not the Title VII contribution and laches issues may be appropriate for consideration by this Court at a

* The cases cited by Northwest at p. 19 n.8 of its Petition are clearly distinguishable in that in each case the Court agreed to review questions on which the District Courts and Courts of Appeals had ruled.

future stage in this litigation,* the present petition is entirely premature.

While the absence of a Court of Appeals' ruling on the Title VII issues presented in

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* The only appellate ruling on the Title VII contribution issues is Glus v. G.C. Murphy Co., 562 F.2d 880 (3d Cir. 1977) which held that a claim for Title VII contribution could not be asserted against a union without prior satisfaction of the jurisdictional charge-filing requirements imposed by Title VII as a pre-condition to assertion of Title VII claims. Rulings by district courts which have preliminarily recognized the possible existence of a right to contribution have all been announced in cases in which an independent basis for Title VII jurisdiction existed. Moreover, the Court of Appeals for the Fifth Circuit, in refusing to recognize a right to contribution for federal antitrust liability, has recently rejected according any weight to these decisions:

> "The cases decided under the Civil Rights Act do not even discuss the rationales for allowing contribution. We decline to discard an established rule of law by relying on cases that offer no reasons." Wilson P. Abraham Construction Corp. v. Texas Industries, Inc., 605 F.2d 897, 903 (5th Cir. 1979).

the Petition is sufficient to demonstrate prematurity, it is also significant that the Court of Appeals did not rule on the threshold question of whether the district court has jurisdiction to determine the union's Title VII liability.* Surely review by the Court is not warranted in advance of a ruling on this issue by the Appellate Court.

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* Proof of the unions' Title VII liability is an essential element of petitioner's asserted right to contribution. It is uncontested that the jurisdictional prerequisite to establishing Title VII liability on the part of the unions (the filing of charges with the EEOC) has not been satisfied. The District Court nonetheless found jurisdiction under 28 U.S.C. §1331. However, where, as here, the claim is so closely related to a statute which contains a specific jurisdictional requirement, fulfillment of that requirement cannot be avoided by attempting to invoke general §1331 jurisdiction. Weinberger v. Salfi, 422 U.S. 749 (1975); Switchmen's Union of North America v. National Mediation Board, 320 U.S. 297 (1943). The only Court of Appeals decision on point has held that a Title VII contribution claim must be dismissed if the statute's jurisdictional filing requirements have not been satisfied. Glus v. G.C. Murphy Co., supra.

Northwest's Title VII claims do not not mature simply because they have been joined in this Petition with a final lower court ruling on its Equal Pay Act contribution claim. The finality of that ruling is the result of an unfortunate choice of litigation tactics: Northwest asked the District Court to enter a final judgment on the Equal Pay Act issue after the Court certified the Title VII contribution claim for appeal. Absent that strategy, this Court would not be asked to review issues until they have first been decided by the Court of Appeals. As discussed above, the Equal Pay Act contribution issue does not merit Supreme Court rule. Any petition for review of the Title VII issues can, and should, await final determinations by the lower Courts.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX 1

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FILED
JUL 29 1977
JAMES F. DAVEY, CLE

NORTHWEST AIRLINES, INC.,

Plaintiff,

v.

TRANSPORT WORKERS UNION OF AMERICA, AFL-CIO and AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,

Defendants.

Civil Action
No. 75-0223

ORDER

Upon consideration of defendants' motion to modify this Court's Order and Memorandum of July 7, 1977, plaintiff's opposition thereto and conditional motion for entry of final judgment pursuant to Rule 54(b) of the Fed. R. Civ. P., and the memoranda of points and authorities submitted by the parties, it is by the Court this 28th day of July, 1977,

ORDERED that this Court's Memorandum, dated July 7, 1977, be, and hereby is, modified by the deletion of footnote 18 at page 7 and the corresponding renumbering of subsequent footnotes; and it is further

ORDERED that the motion for certification, pursuant to 28 U.S.C. §1292(b), for immediate appeal of the denial of defendants' motion be, and hereby is, granted and that the Court's Order of July 7, 1977, be, and hereby is, modified by the addition of the following paragraph:

The Court certifies, pursuant to 28 U.S.C. §1292(b), that it is of the opinion that the denial by this Order of defendants' motion to dismiss plaintiff's claim for reimbursement for some portion of its monetary liability arising under Title VII of the Civil Rights Act involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the Order may materially advance the ultimate termination of the litigation.

and it is further

ORDERED that if the Court of Appeals chooses to hear the unions' interlocutory appeal, there shall be no just reason for delay and final judgment shall forthwith be entered on the Order of July 7, 1977 dismissing, without prejudice, Northwest's claims for reimbursement from the defendants for some portion of its monetary liability with respect to the Equal Pay Act; and it is further

ORDERED that proceedings in this Court shall not be stayed pending resolution of the interlocutory appeal.

Judge